OCBC Bank (M) Bhd v Tan Eng Kwee and another application

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NOS 24–546 OF 1999 AND 24–648 OF 1999
LOW HOP BING J
19 MAY 2003

Land Law *— Sale of land — Order for — Charge action to recover sum due — Security not realized within time stipulated — Whether plaintiff entitled to sum claimed, inclusive of all interest — Natioanl Land Code s 257 — Bankruptcy Act 1967 s 8(2A)*

Two applications were heard together in this action. The plaintiff had applied for an order for sale by way of a charge action to recover a sum of money, inclusive of all interest under ss 256 and 257 of the National Land Code and O 83 r 3(3), (6) and (7) of the Rules of the High Court 1980. Alternatively, the plaintiff sought to claim a sum being debt due from the defendant. At the hearing of the charge action, the defendant did not raise any objection to the making of an order for sale but instead resisted that the plaintiff shall not be entitled to any interest in respect of the debt, the reason being that the plaintiff had not realized the security within six months. The question for determination is whether the plaintiff is entitled to the sum claimed, inclusive of all interest, until the making of the said receiving order, upon a proper construction of s 8(2A) of the Bankruptcy Act 1967.

Held, making an order for sale:

(1) The dispute did not revolve around the question of whether or not the plaintiff must provide the particulars under s 257(1)(a) to (d), as it is trite law that these particulars must be provided in the affidavit under the mandatory provisions of s 257(1)(c) (see p 474A); *Maimunah bte Megat Montak v Mayban Finance Bhd* [1996] 2 MLJ 422; *Multi Purpose Bank Bhd v Diamond Agreement Sdn Bhd* [2000] 5 MLJ 576 and *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 followed.

(2) The phrase 'Notwithstanding sub-s (2)' in s 8(2A) means that s 8(2) is to be disregarded in so far as it is inconsistent with s 8(2A) so that the provisions of s 8(2A) shall prevail and play a predominant role to the exclusion of s 8(2) which has been rendered subservient to s 8(2A). The word 'realize' in s 8(2A) means 'convert into money' (see p 475D).

(3) The plaintiff, as a secured creditor under s 8(2A), should not be entitled to any interest in respect of the debt after the making of the receiving order on 4 October 2001, if the plaintiff did not on or before 4 April 2002 convert into money the security, ie the land charged to the plaintiff. The act of converting into money was the act of receiving payment of the proceeds of sale from the successful bidder pursuant to the order for sale. This did not

A appear to be the case here and so after the making of the receiving order on 4 October 2001, the plaintiff was not entitled to any interest in respect of the debt in question (see p 475E–F).

(4) As the receiving order was made on 4 October 2001, when B s 8(2A) has already been in force, the question of giving s 8(2A) retrospective effect does not arise at all. Hence, s 8(2A) would apply with full force and it was incumbent on the court to give effect to the intention of Parliament which in its wisdom had expressly enacted in clear and unambiguous terms (see p 475H–I).

C

[Bahasa Malaysia summary

Dua permohonan telah didengar bersama dalam tindakan ini. Plaintif telah memohon untuk satu perintah jualan melalui satu tindakan D gadaian untuk mendapat balik sejumlah wang, termasuklah semua faedah di bawah ss 256 dan 257 Kanun Tanah Negara dan A 83 k 3(3), (6) dan (7) Kaedah-Kaedah Mahkamah Tinggi 1980. Secara alternatifnya, plaintif memohon untuk menuntu sejumlah hutang yang perlu dibayar daripada defendan. Semasa perbicaraan tindakan gadaian tersebut, defendan tidak menimbulkan apa-apa bantahan E untuk membuat satu perintah jualan tetapi sebaliknya membantah bahawa plaintif tidak sepatutnya berhak kepada apa-apa faedah berkaitan hutang tersebut, oleh sebab plaintif tidak merealisasikan cagaran tersebut dalam tempoh enam bulan. Persoalan untuk ditentukan adalah sama ada plaintiff berhak kepada jumlah yang dituntut, termasuk semua faedah, sehingga perintah penerimaan F dibuat, dengan pembetukan betul s 8(2A) Akta Kebankrapan 1967.

Diputuskan, membuat satu perintah jualan:

(1) Pertikaian tidak berkisar kepada persoalan tentang sama ada atau G tidak plaintif perlu mengemukakan butir-butir tersebut di bawah s 257(1)(a) hingga (d), kerana ia adalah undang-undang tetap bahawa butir-butir tersebut perlu dikemukakan dalam afidavit di bawah peruntukan-peruntukan mandatori s 257(1)(c) (lihat ms 474A); *Maimunah bte Megat Montak v Mayban Finance Bhd* [1996] 2 MLJ 422; *Multi Purpose Bank Bhd v Diamond Agreement* H *Sdn Bhd* [2000] 5 MLJ 576 dan *Citibank NA v Ibrahim bin Othman* [1994] 1MLJ 608 diikut.

(2) Istilah 'Notwithstanding sub-s (2)' dalam s 8(2A) bermakna s 8(2) tidak perlu diendahkan selagi ia tidak konsisten dengan s 8(2A) agar peruntukan s 8(2A) kekal dan memainkan peranan I yang utama terhadap pengecualain s 8(2) yang dianggap tertakluk kepada s 8(2A). Perkataan 'realize' dalam s 8(2A) bermaksud 'convert into money' (lihat ms 475D).

(3) Plaintif, sebagai seorang pemiutang yang terjamin di bawah s 8(2A), tidak berhak kepada apa-apa faedah berkaitan hutang tersebut selepas perintah penerimaan dibuat pada 4 Oktober 2001, jika plaintif tidak pada atau sebelum 4 April 2002 menukar cagaran tersebut ke dalam bentuk wang, iaitu tanah yang dicagarkan kepada plaintif. Tindakan menukar ke dalam bentuk wang adalah satu tindakan menerima bayaran dari hasil jualan daripada penawar yang berjaya menurut perintah jualan tersebut. Ini bukan kesnya di sisni dan oleh itu selepas membuat perintah penerimaan pada 4 Oktober 2001, plaintif tidak berhak kepada apa-apa faedah berkaitan hutang yang dipersoalkan (lihat ms 475E–F).

(4) Memandangkan perintah penerimaan telah dibuat pada 4 Oktober 2001, apabila s 8(2A) telahpun berkuatkuasa, persoalan memberikan s 8(2A) kesan kebelakangan tidak timbul langsung. Justeru itu, s 8(2A) akan terpakai sepenuhnya dan ia adalah wajib ke atas mahkamah untuk melaksanakan niat Parliamen yang dengan nyata telah menggubal dalam terma-terma yang jelas dan tidak taksa (lihat ms 475H–I).]

Notes

For cases on order for sale of land, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3852–3673.

Cases referred to

Chinese Tin Mines Rehabilitation Loans Board v Official Assignee, FM [1957] MLJ 65 (not folld)

Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608 (folld)

Maimunah bte Megat Montak v Mayban Finance Bhd [1996] 2 MLJ 422 (folld)

Malayan Banking Bhd v The Official Assignee (Receivers of the estate of Velu Marimuthu, bankrupt) [1993] 2 AMR 28 (not folld)

Multi Purpose Bank Bhd v Diamond Agreement Sdn Bhd [2000] 5 MLJ 576 (folld)

Public Bank Bhd lwn Khaliddin bin Busu [1998] MLJU 293 (refd)

United Asian Bank Bhd v Personal representative of Roshammah (decd) & Ors [1994] 3 MLJ 327 (not folld)

Legislation referred to

Bankruptcy Act 1967 s 8(1), (2A)

National Land Code ss 256, 257

Rules of the High Court 1980 O 83 rr 3(3), (6), (7)

Anis Idura Hashim (Shearn Delamore & Co) for the plaintiff.

Mohd Hanafiah bin Kechik (Assistant Official Assignee) for the defendant.

Low Hop Bing J:

Application

These two applications are by consent of the parties herein heard together.

Parties herein have raised an important, interesting and novel question of law to be considered and addressed by this court, in the course of hearing the plaintiffs application on 23 January 2003 by way of a charge action for an order for sale to recover a sum of RM5,289,021.42 which is inclusive of all interest until that date, under ss 256 and 257 of the National Land Code ('s 256 and s 257') and O 83 r 3(3), (6) and (7) of the Rules of the High Court 1980 ('O 83 r 3(3), (6) and (7)').

As an alternative, the plaintiff claimed a sum of RM4,803,362.60 being the debt due from the defendant in OS No 24–546–99, with interest until the making of the receiving order against the defendant on 4 October 2001.

Both the aforesaid sums were stated in the plaintiffs affidavit.

Objection to interest

At the hearing of this charge action, the defendant, against whom the said receiving order was made on 4 October 2001 vide Johor Bahru High Court No 3635–1999, did not raise any objection to the making of an order for sale but instead resisted that the plaintiff as a secured creditor shall not be entitled to any interest in respect of the debt after the making of the said receiving order as the plaintiff has not realized the security within six months thereof ie on or before 4 April 2002. The defendant relied on s 8(2A) of the Bankruptcy Act 1967 ('s 8(2A)').

Question for determination

This may be formulated as follows:

> Upon a proper construction of s 8(2A), in realizing the security in this charge action, is the plaintiff entitled to RM5,212,816.01 inclusive of all interest as at 23 January 2003 or RM4,803,362.60 inclusive of interest until the making of the said receiving order on 4 October 2001?

Counsel's submission and decision by court

Particulars under s 257

En Mohd Hanafiah bin Kechik, the assistant official assignee who under s 8(1) of the Bankruptcy Act 1967 ('s 8(1)') has been constituted the receiver of the property of the debtor ie the defendant herein, submitted that under s 8(2A), the plaintiff is only entitled to the total amount of RM4,803,362.60.

Cik Anis Idura Hashim, learned counsel for the plaintiff, submitted that it is mandatory for the plaintiff to provide all the particulars under s 257(1)(a) to (d).

At this juncture, it must be emphasized immediately that the dispute does not revolve around the question whether or not the plaintiff must provide the particulars under s 257(1)(a) to (d), as it is trite law that these particulars must be provided in the affidavit under the mandatory provisions of s 257(1)(c): *Maimunah bte Megat Montak v Mayban Finance Bhd* [1996] 2 MLJ 422 (FC); *Multi Purpose Bank Bhd v Diamond Agreement Sdn Bhd* [2000] 5 MLJ 576 (HC); *Citibank NA v Ibrahim bin Othman* [1994] 1MLJ 608 (HC); and O 83 r 3(3), (6) and (7).

Interest after receiving order

In respect of s 8(2A), it was submitted for the plaintiff that a secured creditor who is not proving his debt in the bankruptcy of the chargor is entitled to the full amount of his debt with interest and costs, relying on *Chinese Tin Mines Rehabilitation Loans Board v Official Assignee, FM* [1957] MLJ 65 (HC); *Malayan Banking Bhd v The Official Assignee (Receivers of the estate of Velu Marimuthu, bankrupt)* [1993] 2 AMR 28 (HC); and *United Asian Bank Bhd v Personal representative of Roshammah (decd) & Ors* [1994] 3 MLJ 327 (HC).

A careful analysis of these authorities cited for the plaintiff is necessary in order to ascertain the extent of the support that may be derived therefrom.

In *Chinese Tin Mines*, the relevant provisions which came up for consideration were s 9(i) and (ii) of the then Bankruptcy Enactment which have now been re-enacted in s 8(1) and (2), the relevant portions of which are reproduced as follows:

> 8 Effect of receiving order
>
> (1) On the making of a receiving order ....., no creditor shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court .....
>
> (2) This section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section has not been passed .....

After considering the then provisions of s 9(i) and (ii) viz the precursors of the present s 8(1) and (2), Thomson J (later LP), held that there was no reason either on authority or on principle why a secured creditor who did not prove in the bankruptcy should be deprived of the interest which the law and his contract allowed him.

Chinese Tin Mines, was followed in *Malayan Banking Bhd*, where Abdul Kadir b Sulaiman J (now JCA) on 18 October 1993 considered, inter alia, s 8(2).

United Asian Bank Bhd, also appears to follow *Chinese Tin Mines*, and s 8 was considered on 30 March 1994 by Mahadev Shankar J (later JCA) who held, inter alia, that s 8 did not preclude the bank from effecting

recovery against the deceased's estate as the bank was a secured creditor and the judgment debt of the deceased's estate was not provable in the borrower's bankruptcy.

It must be observed that their Lordships in these three judgments were not called upon to consider and determine the ambit or purview of the new provisions contained in s 8(2A), which came into force on 17 July 1992.

In the circumstances, I am of the view that the thrust of those three judgments could render no assistance to the plaintiff.

Section 8(2A) provides as follows:

> Notwithstanding sub-s (2), no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within six months from the date of the receiving order.

I shall now proceed to consider and address the ambit and implication of s 8(2A).

The phrase 'Notwithstanding sub-s (2)' in s 8(2A) means that s 8(2) is to be disregarded in so far as it is inconsistent with s 8(2A) so that the provisions of s 8(2A) shall prevail and play a predominant role to the exclusion of s 8(2) which has been rendered subservient to s 8(2A).

The word 'realize' in s 8(2A) means 'convert into money' (see *The Concise Oxford Dictionary* (9th Ed).

That being the case, the plaintiff as a secured creditor under s 8(2A) shall not be entitled to any interest in respect of the debt after the making of the receiving order on 4 October 2001 if the plaintiff did not on or before 4 April 2002 convert into money the security, ie the land charged to the plaintiff. The act of converting into money is the act of receiving payment of the proceeds of sale from the successful bidder pursuant to the order for sale. This does not appear to be the case here and so after the making of the receiving order on 4 October 2001, the plaintiff is not entitled to any interest in respect of the debt in question.

There is a dearth of authorities on the interpretation of s 8(2A).

I am mindful of the decision of Faiza Tamby Chik J in *Public Bank Bhd lwn Khaliddin bin Busu* [1998] MLJU 293 (HC), where a receiving order was made against a chargor of land ie the defendant on 17 June 1991 which was before the coming into force of s 8(2A) on 17 July 1992. The learned judge held, inter alia, that s 8(2A) was not intended to have retrospective effect and so s 8(2) continued to apply, in which case, the interest awarded in the order for sale remained unaffected by s 8(2A).

In the instant case, as the receiving order was made on 4 October 2001, when s 8(2A) has already been in force, the question of giving s 8(2A) retrospective effect does not arise at all. Hence, s 8(2A) would apply with full force and it is incumbent on the court to give effect to the intention of Parliament which in its wisdom has expressly enacted in clear and unambiguous terms.

Conclusion

By reason of the foregoing grounds, I make an order for sale under s 256(3) and pursuant to the mandatory provision of s 257(1)(c), I specify the total amount of RM4,803,362.60 being the amount due to the chargee, ie the plaintiff at the date on which this order for sale is made, ie today.

In other words, interest shall only accrue until 4 October 2001 in both OS No 24–546–99 and OS No 24–648–99.

Order for sale made.

Reported by Wong Ee Lynn